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Supreme Court, U.S.
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No. 96-68

In The

Supreme Court of the United States

October Term, 1996

RAYMOND SCHUVER AND STEVEN SCHUVER,

Petitioners,

v.

E. I. DU PONT DE NEMOURS AND COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Iowa Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Iowa Supreme Court correctly applied the preemption provision of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v(b), in finding Petitioners' claims preempted because they were based on warning and label requirements in addition to or different from that required under the Act?

RULE 29.6 STATEMENT

Respondent E.I. du Pont de Nemours and Company ("DuPont") has no parent company. There are presently five *publicly* held entities in which DuPont, or a subsidiary or affiliated company of DuPont, owns an interest: DuPont Canada Inc. and DuPont Photomasks, Inc. are subsidiary companies, and Shaman Pharmaceuticals Inc., DNA Plant Technology Corporation and Etec Systems, Inc. are companies in which DuPont holds an indirect minority, non-controlling interest.

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STATEMENT OF THE CASE

A. Facts and Proceedings Below

Raymond Schuver and Steven Schuver (Petitioners) filed a four count complaint for damages for reduced corn yields which they allege resulted from "carryover" of the E.I. du Pont de Nemours and Company (DuPont) manufactured herbicide Preview®. [App. 2a-3a]. As to DuPont, the counts alleged negligence, strict liability, and implied warranty. Petitioners alleged that Preview®, used to control weeds in their soybean crop, "carried over" and damaged corn crops planted in following years. [App. 2a]. Petitioner Raymond Schuver did not read the application directions, which specifically warned about safe use in certain types of soils, before applying Preview®. [App. 2a].

DuPont filed a motion for summary judgment on all of Petitioners' counts. The trial court found that Petitioners' negligence and strict liability claims were preempted under FIFRA [App. 17a], and also determined that these claims were founded on contract theories, that DuPont warned of the risk to rotational crops on the Preview® label, and that there was an adequate disclaimer of liability. [App. 18a-20a]. Petitioners' warranty claims were dismissed under state law [App. 18a-20a], and the trial court sustained DuPont's motion for summary judgment [App. 20a]. The Iowa Supreme Court affirmed the district court, concluding that federal law preempted all of Petitioners' claims. [App. 2a]. In addition, the court found that the strict liability claim failed for lack of proof under state law. [App. 13a-14a].

B. FIFRA Preemption Structure

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§136, *et seq.*, "represents the federal government's detailed comprehensive system for the strict regulation of pesticides."[1] *Kennan v. Dow Chemical Co.*, 717 F.Supp. 799, 804 (M.D. Fla. 1989). Enacted in 1947, FIFRA gave the United States Department of Agriculture authority over the regulation, registration and labeling of commercial poisons and devices. *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 601 (1991).

In 1972, Congress completely revised FIFRA, transferring enforcement responsibility from the Department of Agriculture to the newly-created Environmental Protection Agency (EPA). The 1972 amendments significantly strengthened FIFRA's registration and labeling standards, granted increased enforcement authority to the EPA, and " 'transformed FIFRA from a labeling law into a comprehensive regulatory statute.' " *Mortier,* 501 U.S. at 601-02 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991, 104 S.Ct. 2862, 2866 (1984)).

The revisions to FIFRA included the express preemption clause:

> (b) Uniformity. Such State *shall not impose* or continue in effect *any requirements for labeling* or packaging in addition to or different from those required under this subchapter.

7 U.S.C. §136v(b) (1994) (emphasis added).

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[1] FIFRA's definition of "pesticide" includes the DuPont manufactured herbicide involved in this case. 7 U.S.C. §136(u).

FIFRA requires EPA registration of all pesticides, which includes herbicides under FIFRA's definition of "pesticide," sold and distributed in the United States. 7 U.S.C. §§136(u), 136a. Pursuant to 7 U.S.C. §136a(c)(5)(A)-(D), the EPA administrator decides whether to register an herbicide by determining whether:

> (A) [I]ts composition is such as to warrant the proposed claims for it;
>
> (B) [I]ts labeling and other material required to be submitted comply with the requirements of this subchapter;
>
> (C) [I]t will perform its intended function without unreasonable adverse effects on the environment; and
>
> (D) [W]hen used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

A pesticide that is duly registered with the EPA must have a label containing approved warnings adequate to protect health and the environment. 7 U.S.C. §136(q)(1)(G). FIFRA further requires that registration applicants file "a full description of the tests made and the results thereof upon which the claims [with respect to the herbicide] are based." 7 U.S.C. §136a(c)(1)(F).

EPA regulations under FIFRA dictate the specific test data that must be provided for each pesticide category. 40 C.F.R. §§158-158.740. The test data includes extensive information relating to product composition (40 C.F.R. §158.155), residue chemistry (40 C.F.R. §158.240), toxicity levels (40 C.F.R. §158.340), the effects of spray drift (40 C.F.R. §158.440) and exposure to plant life (40 C.F.R.

§158.540). EPA regulations promulgated under FIFRA also prescribe strict laboratory practice standards that must be satisfied when conducting tests or studies relating to the application for pesticide registration. 40 C.F.R. §§160-160.195.

Equally stringent regulations have been established by the EPA pursuant to FIFRA for labeling. Labeling "must show clearly and prominently . . . [w]arning or precautionary statements as prescribed" by the EPA, and the label "[w]hen followed . . . must be adequate . . . to prevent unreasonable adverse effects on the environment." 40 C.F.R. §156.10(a)(1)(vii), (i)(1)(i).[2] Even after initial registration and approval, the pesticide and its label remain subject to EPA scrutiny through the "special review" process (40 C.F.R. §§154-154.35) and the "reregistration" process (40 C.F.R. §152.144), pursuant to which the EPA conducts an ongoing program for the systematic review of pesticide registration and labeling.

SUMMARY OF ARGUMENT

This case does not present any special circumstances to support Petitioners' request for vacation and remand.

The opinion of the Iowa Supreme Court at issue here fully sets forth a rationale consistent with the holdings of

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[2] In addition to specifying the particular warning language (40 C.F.R. §156.10(a)(1),(h)), the EPA also regulates the type size (40 C.F.R. §156.10(a)(2)(ii)(A)), color (40 C.F.R. §156.10(a)(2)(ii)(B), (h)(1)(i)), and placement (40 C.F.R. §156.10(a)(4)) of the warning and all other specifications concerning labeling.

the courts of appeals and with the prior opinions of the Court. The court below properly construed the Petitioners' claims as presenting allegations addressed to DuPont's responsibilities under FIFRA to convey warnings and were thus preempted. There is no meaningful difference of opinion among the circuits to warrant further review.

REASONS WHY PETITION SHOULD BE DENIED

I. THE DECISION OF THE IOWA SUPREME COURT DOES NOT CONFLICT WITH ANY OPINION OF THIS COURT

Asking that this Court grant, vacate, and remand [Pet. 17], the Schuvers maintain that the decision below is inconsistent with this Court's recent decision in *Medtronic, Inc. v. Lohr*, ___ U.S. ___, 64 U.S.L.W. 4625 (U.S. June 26, 1996), 1996 U.S. LEXIS 4260. The decision in this case is not inconsistent with the opinion in *Medtronic*, and is quite consistent with other authority of this Court. There are no special circumstances to warrant the use of the procedure requested by Petitioners.

In *Medtronic*, this Court recently found that the Medical Device Amendments (MDA) did not preempt common law causes of action for failure of a pacemaker wire which was marketed under the MDA's §510(k) notification process. The specific preemption provision in the instant case, however, differs greatly from that in *Medtronic*. For example, the statute here, 7 U.S.C. §136v(b), expressly and specifically defines state requirements for labeling and packaging as the area preempted

by federal law. This provision, therefore, does not present the broad proposition advanced in *Medtronic*, under which the preemptive effect is dependent on the issuance of FDA regulations. *Medtronic*, 1996 U.S. LEXIS 4260 at *31 n.9, *43-4, *48. Moreover, unlike the FDA, *Medtronic* at *21, the EPA has not provided by regulations for exceptions to FIFRA preemption.

Further, because the FIFRA preemption provision is limited to warnings on labels and packaging, other theories of recovery and remedies still may be available to potential claimants. Indeed, the Iowa Supreme Court in this instant case [App. 6a] and in its earlier decision in *Clubine v. American Cyanamid Co.*, 534 N.W.2d 385, 387 (Iowa 1995), only preempted under FIFRA those causes of action that affected the adequacy of warning and instructions on labels and packages approved by the EPA.

The scope of preemption under FIFRA is much closer to the limited reach of the provision found appropriate by this Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993). Likewise, the position taken by the Iowa Supreme Court in the instant case is totally consistent with this Court's recognition in *Mortier* that there is an area under FIFRA, namely requirements for labeling and packaging, where the EPA preempts any state action or interference. *Mortier*, 501 U.S. at 613, 615.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

Since *Cipollone*, *every* federal circuit court which has considered FIFRA preemption has concluded that state

causes of action based upon the adequacy of warnings or instructions of FIFRA-registered pesticides are expressly preempted. *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995); *Taylor Ag. Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *King v. E.I. du Pont de Nemours and Co.*, 996 F.2d 1346 (1st Cir. 1993), *cert. dismissed*, 114 S.Ct. 490 (1993); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993) (*"Worm II"*); *Shaw*, 994 F.2d 364; *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.) (*"Papas II"*), *cert. denied*, 114 S.Ct. 300 (1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.) (*"Arkansas-Platte II"*), *cert. denied*, 114 S.Ct. 60 (1993).

Indeed, most state courts of highest resort that have considered the issue have joined in applying this Court's teaching in *Cipollone* to the FIFRA preemption provision in finding state common law causes of action preempted where they would affect the warnings and labels approved by the EPA.[3]

Also, contrary to Petitioners' bald assertion [Pet. 16], these courts have not "applied *Cipollone* in a rote manner," but have thoughtfully considered the implications of *Cipollone* and examined the language and statutory

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[3] *See, e.g., Hopkins v. American Cyanamid Co.*, 666 So. 2d 615 (La. 1996); *Quest Chemical Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995); *Goodwin v. Bacon*, 896 P.2d 673 (Wash. 1995); *Hue v. Farmboy Spray Co.*, 896 P.2d 682 (Wash. 1995); *All-Pure Chemical Co. v. White*, 896 P.2d 697 (Wash. 1995); *Clubine*, 534 N.W.2d 285; *Hochberg v. Zoecon Corp.*, 657 N.E.2d 1263 (Mass. 1995); *Jenkins v. Amchem Products, Inc.*, 886 P.2d 869 (Kan. 1994), *cert. denied*, 116 S.Ct. 80 (1995).

history of the FIFRA preemption provision. *See, e.g., King,* 996 F.2d at 1349-50; *Jenkins,* 886 P.2d at 879.

In the present case, a decision contrary to the Iowa Supreme Court's would "require the finder of fact to determine whether, under state law, [DuPont] adequately labelled and packaged the product. This inquiry is precisely what Section 136v [of FIFRA] forbids." *Papas II,* 985 F.2d at 518. The Iowa Supreme Court found that the Petitioners' claims, however artfully worded, boiled down to "merely another way of arguing that DuPont's labels should have warned against using" DuPont's product in Petitioners' county. [App. 8a, 11a].[4] The determination of what these claims allege under state law is properly a matter for the Iowa Supreme Court and should not be disturbed.

In the final analysis, the Iowa Supreme Court properly applied this Court's teaching in *Cipollone* to find that these warning claims were preempted.

III. PETITIONERS' REQUESTED RELIEF IS NOT APPROPRIATE

Petitioners do not ask that this Court grant a plenary hearing in this case. Rather, they request that the Court grant, vacate, and remand (GVR) the case in light of the recent decision in *Medtronic.* [Pet. 17]. This request is totally inappropriate.

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[4] None of Petitioners' causes of action claim as their basis a violation of a FIFRA-created duty. Rather, all are based on state common law claims bringing into question the adequacy of the warnings, and are thus preempted. *Worm II,* 5 F.3d at 748.

As we have shown above, the application of *Medtronic* to the present case is not appropriate in view of the significant differences of the two regulatory schemes and the facts presented by both cases. The instant case is closely aligned with this Court's decision in *Cipollone* and, in fact, applies the principles set forth in *Cipollone*.

In addition, this case does not present the special circumstances that this Court has viewed to be significant in deciding whether to GVR: there has been no change of position and no confession of error by any party; the Iowa Supreme Court clearly articulated its rationale in a full, written opinion that incorporates the controlling teaching of this Court; the decision under review is in the mainstream of authority on the issue presented; this is not a criminal matter. *Stutson v. United States*, ___ U.S. ___, 116 S.Ct. 600, 602-3 (1996); *Lawrence v. Chater*, ___ U.S. ___, 116 S.Ct. 604, 608-9 (1996).

It is submitted that the important values of judicial efficiency and finality will not be promoted by a remand. *Stutson*, 116 S.Ct. at 603. There is no special reason presented here to warrant a departure from a sparing exercise of this Court's GVR powers. *Lawrence*, 116 S.Ct. at 609.

IV. PART OF PETITIONERS' CLAIM WAS DISMISSED ON INDEPENDENT STATE GROUNDS

As the opinion of the Iowa Supreme Court clearly notes, Petitioners' strict liability claim was also dismissed for lack of proof. [App. 13a-14a]. Petitioners have conceded this point in their Petition. [Pet. 10]. Therefore, the

issue of preemption of the strict liability claim is not clearly presented.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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